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No. 95-353

In the Supreme Court of the United States

OCTOBER TERM, 1995

MARVIN MORRIS MITCHELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly instructed the jury on the element of willfulness in a prosecution under 26 U.S.C. 7206(1).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished, but the decision is noted at 51 F.3d 283 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1995. A petition for rehearing was denied on June 5, 1995. Pet. App. 1b. The petition for a writ of certiorari was filed on August 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on four counts of willfully subscribing a false tax return, in violation of 26 U.S.C. 7206(1), and was sentenced to thirty months' imprisonment, to be followed by one year of supervised release. Gov't C.A. Br. 2. The court of appeals affirmed. Pet. App. 1a-8a.

1. Petitioner is a domestic relations attorney who, despite a thriving practice, faced serious financial difficulties in August 1985. Petitioner had not filed federal income tax returns since 1982 and had numerous tax liens and civil judgments pending against him. Petitioner's tax lawyer asked Richard LeRoy, an accountant, to assist in the management of petitioner's financial affairs. The assistance was to include the establishment of financial controls for petitioner's law office and the preparation of his past due 1983 and 1984 federal and state tax returns. Petitioner agreed to cooperate fully with LeRoy in reporting his income and expenses. Gov't C.A. Br. 3-4.

Despite those assurances of cooperation, LeRoy encountered difficulties in preparing petitioner's 1983 and 1984 tax returns. After LeRoy told petitioner that he needed to identify the sources of petitioner's bank deposits, petitioner provided LeRoy with handwritten notes, which petitioner described as complete and containing contemporaneous summaries of monthly income for 1983 and 1984, broken down by client. Petitioner told LeRoy that those handwritten notes were his "bible." He eventually provided LeRoy with a similar summary of income for 1985. Gov't C.A. Br. 5.

LeRoy used the handwritten summaries to calculate petitioner's gross income for the tax years in question. The evidence at trial demonstrated, however, that petitioner had omitted from the summaries substantial fees paid to him by clients in more than 25 cases. Moreover, despite the financial controls that LeRoy had placed on petitioner's office, petitioner concealed from LeRoy payments exceeding $900,000 received during tax year 1986. Gov't C.A. Br. 5-6.

Petitioner also told LeRoy that the payments reflected in the handwritten summaries included some fees that had been distributed to co-counsel. At LeRoy's request, petitioner provided a letter listing those portions of the fees attributable to tax years 1983 through 1985 that had been paid to co-counsel. LeRoy used those figures to reduce petitioner's gross income. The figures produced by petitioner, however, overstated the amounts paid to co-counsel by about $700,000. Gov't C.A. Br. 8. Petitioner also reported false business deductions for 1985 and 1986; he told LeRoy that certain personal expenses were deductible business expenses. *Id.* at 9.

2. At trial, petitioner testified that he had never intended that LeRoy rely only on the handwritten summaries and the letters listing co-counsel fees to prepare his returns. He also presented evidence that LeRoy's accounting practices were deficient. On cross-examination, however, the government demonstrated that petitioner had previously represented to prosecutors and the grand jury that his handwritten notes were highly accurate summaries of the fees that he had received. A government witness also testified that LeRoy had satisfied an accountant's standard of care. Gov't C.A. Br. 13.

The district court instructed the jury that, to convict petitioner of subscribing a false tax return, it was required to find that petitioner had acted willfully. The court defined willfulness as "the voluntary and intentional violation of a [known] legal duty." Pet. App. 5a; see Court's Instr. No. 12 (App., *infra*, 1a). The district court also charged the jury that it had to find that petitioner "did not believe the return to be true and correct as to a material matter." *Ibid.*

Petitioner proposed two additional instructions on the requisite mental state for conviction. He first proposed that the jury be charged as follows:

> The crime charge[d] in this case . . . requires proof of specific intent before the defendant can be convicted[.] . . . To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids * * * purposely intending to violate the law[.] . . . An act or failure to act is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

See Pet. 4. The district court rejected that instruction. Pet. App. 5a. It also rejected a proposed charge that "[n]egligent conduct is not sufficient to constitute willfulness," *ibid.*, stating to defense counsel that "[y]ou can argue it, certainly," but that the proposed instruction was "argumentative in form." Gov't C.A. E.R. 1057.

3. The court of appeals affirmed. Pet. App. 1a-8a. It rejected petitioner's contention that the district court's refusal to give the proposed instructions was error. *Id.* at 4a-5a. The court ruled that the district court's definition of willfulness was "a correct statement of the law," *id.* at 5a, and pointed out that the

charge was taken directly from this Court's decision in *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam). Pet. App. 5a. It also rejected petitioner's argument that the instruction as given did not make sufficiently clear that a finding of negligence would preclude a finding of willfulness on his part. The court observed that petitioner had presented evidence that the false statements on the returns were the result of LeRoy's purportedly negligent belief that he had reported all of petitioner's income, and thus the jury had been made aware of petitioner's theory of the case. *Ibid.*

ARGUMENT

Petitioner contends that the district court erred when it declined to instruct the jury on what he calls his "good faith" defense to the charge of willfully subscribing a false tax return. Pet. i, 7. He acknowledges (Pet. 6-7) that, under *United States* v. *Pomponio*, 429 U.S. 10 (1976) (per curiam), the district court's instruction on the definition of willfulness was proper as given and no further good-faith instruction was necessary. He contends, however, that *Pomponio* is in conflict with *Mathews* v. *United States*, 485 U.S. 58 (1988), which holds that a defendant is entitled to an instruction on any recognized defense for which there is sufficient evidence before the jury. He also contends that the courts of appeals are in conflict on whether, in a criminal tax case, a trial court must give a separate instruction on a defendant's good-faith defense even when that court has properly instructed the jury under *Pomponio* on the definition of willfulness. The instruction given by the district court in this case was correct, and there is no conflict between *Pomponio* and *Mathews*;

furthermore, the claimed conflict among the courts of appeals does not warrant this Court's review.

1. a. In *Pomponio*, this Court reaffirmed that, in the context of criminal tax cases, "willfulness * * * simply means a voluntary, intentional violation of a known legal duty." 429 U.S. at 12; see also *Cheek* v. *United States*, 498 U.S. 192, 200-201 (1991). The Court thus reversed a decision by the Fourth Circuit holding that the jury in that case had been improperly instructed that "[g]ood motive alone is never a defense where the act done or omitted is a crime." 429 U.S. at 11. The Court stated that, because the trial court had correctly instructed the jury on the definition of willfulness, "[a]n additional instruction on good faith was unnecessary." *Id.* at 13.

Here, as in *Pomponio*, the jury was properly instructed on willfulness; indeed, the instruction was virtually identical to the one held to be sufficient in *Pomponio*. The district court declined to instruct the jury further about negligence, mistake, or accident, but only because it correctly concluded that those matters were adequately covered by the definition of willfulness, not because it intended to preclude petitioner from arguing that his subscribing a false tax return was merely negligent, and not willful. The court refused the negligence instruction because it believed that the formulation was argumentative, but petitioner was expressly left free to argue negligence to the jury.

It is well settled that a defendant is not entitled to have the jury instructed in words of his choosing; it is sufficient if the instructions given adequately cover the relevant issues and correctly state the applicable law. See, *e.g.*, *United States* v. *Davis*, 953 F.2d 1482, 1492 (10th Cir.), cert. denied, 504 U.S. 945 (1992). The

willfulness instruction in this case fully satisfies that standard, for the instruction precluded the jury from convicting petitioner on the basis of conduct resulting from mistake, accident, or negligence. Accidental actions or actions resulting from mere negligence are not voluntary, intentional violations of the law. The jury also could not have convicted petitioner for subscribing a false return if it believed that the material falsity was the result of an honest mistake as to the facts or law, for the court instructed the jury that, to convict, it had to find that petitioner did not believe that his returns were truthful. See p. 4, *supra*. The court of appeals thus correctly ruled that there was no need for a separate instruction on negligence, accident, or mistake.

b. *Mathews* is not inconsistent with any of the above. In *Mathews*, the Court held that, "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." 485 U.S. at 63. *Mathews*, however, involved the affirmative defense of entrapment, and it relied on other cases involving affirmative defenses, such as self-defense. See *id.* at 63-64 (discussing, *inter alia*, *Stevenson* v. *United States*, 162 U.S. 313 (1896)). This case does not involve an affirmative defense of "good faith," and in fact petitioner never requested a "good-faith defense" instruction from the district court. Rather, he requested that the district court refine its definition of willfulness, one of the elements of the offense that the government was required to prove in its affirmative case. In this case, therefore, there is no basis for any contention that the district court precluded petitioner from presenting a defense, as that concept is properly understood.

The only question is whether the district court adequately conveyed the government's burden on willfulness to the jury. In light of *Pomponio*, the instructions accomplished that result.

2. Petitioner contends that review is warranted because other courts of appeals have concluded, since *Mathews*, that, even if a jury is given the correct *Pomponio* instruction on willfulness, an additional good-faith defense instruction is required in cases in which the evidence supports such an instruction. See *United States* v. *Morris*, 20 F.3d 1111, 1117-1118 (11th Cir. 1994); *United States* v. *Harting*, 879 F.2d 765, 769-770 (10th Cir. 1989); *United States* v. *Casperson*, 773 F.2d 216, 223 (8th Cir. 1985). That contention does not warrant this Court's review.

First, as we noted above, petitioner did not request an instruction on the defense of good faith; he requested a further definition of willfulness. Thus, to the extent that *Morris*, *Harting*, and *Casperson* relied on *Mathews* to conclude that the jury should have been instructed on a good-faith defense, that reasoning has no relevance to this case. Petitioner has not pointed to any federal appellate decision holding that a separate instruction on, or specific reference to, negligence, accident, or mistake is necessary when the trial court correctly charges the jury on the definition of willfulness, and we have found no such decision. The issue treated in *Morris*, *Harting*, and *Casperson* is therefore not properly presented in this case.

Second, notwithstanding the Eleventh Circuit's recent decision in *Morris*, the "discernible trend" in the courts of appeals is against the requirement of a separate instruction on good faith. *United States* v. *Dockray*, 943 F.2d 152, 155 (1st Cir. 1991) (no separate

instruction required). The majority rule is that no such instruction is required. See *ibid.*; *United States* v. *Gross*, 961 F.2d 1097 (3d Cir.), cert. denied, 113 S. Ct. 439 (1992); *United States* v. *Sehnal*, 930 F.2d 1420, 1427 (9th Cir.), cert. denied, 502 U.S. 908 (1991); *United States* v. *Wilson*, 887 F.2d 69, 76-77 (5th Cir. 1989); *United States* v. *Sassak*, 881 F.2d 276, 280 (6th Cir. 1989); *United States* v. *Verkuilen*, 690 F.2d 648, 655-656 (7th Cir. 1982). Courts of appeals that have previously indicated that a good-faith instruction should be given have limited those holdings. The Eighth Circuit, which held that such an instruction was necessary in *Casperson*, a mail and wire fraud case, subsequently held that one was not required in *United States* v. *Cegelka*, 853 F.2d 627, 628-629 (1988) (false statement on Medicare forms in violation of 42 U.S.C. 1395nn(a)(1)), cert. denied, 488 U.S. 1011 (1989), and *United States* v. *Sanders*, 834 F.2d 717, 719 (1987) (false statement to government agency in violation of 18 U.S.C. 1001). Both the Fifth and Sixth Circuits have apparently abandoned their earlier rulings that a separate good-faith instruction is required. Compare *United States* v. *Hunt*, 794 F.2d 1095, 1098 (5th Cir. 1986), with *United States* v. *Goss*, 650 F.2d 1336 (5th Cir. 1981), and compare *United States* v. *Sassak*, 881 F.2d at 280, with *United States* v. *Duncan*, 850 F.2d 1104, 1117-1118 (6th Cir. 1988). In light of the general trend against requiring a separate instruction, the courts of appeals adhering to the minority rule may reconsider their position.

Finally, although we believe that *Morris*, *Harting*, and *Casperson* were wrongly decided, we also believe that the issue is not sufficiently important in the administration of federal criminal trials to warrant review by this Court. The Court has denied certio-

rari in two recent cases raising a similar issue, see *Reid* v. *United States*, 113 S. Ct. 967 (1993); *Gross* v. *United States*, 113 S. Ct. 439 (1992), and there is no reason for a different result in this case.* All courts of appeals are in accord with the underlying principle that the instructions, considered as a whole, must present the essential nature of the case to the jury and guide the jury to acquit if it believes the defense. The difference of opinion concerns whether, for some offenses, a separate instruction on good faith is necessary, above and beyond instructions that the defendant must act willfully (as properly defined). In light of *Pomponio* and the district courts' broad discretion in formulating jury instructions, we submit that no additional good-faith charge is required. But the existence of a different rule in some circuits, requiring the instruction to be given, is not as a general matter harmful or burdensome to the jury, the government, or the courts.

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* *Reid* involved a prosecution for tax evasion under 26 U.S.C. 7201. *Gross* involved a prosecution for making false statements in filings with the Securities and Exchange Commission, in violation of 15 U.S.C. 78ff(a). We are providing petitioner with copies of our briefs in opposition in both cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

COURT'S INSTRUCTION NO. 12

The defendant is charged in each of the counts in the indictment with filing a false tax return in violation of Section 7206(1) of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant made, or caused to be made, and signed an income tax return that was false as to a material matter;

Second, the return contained a written declaration that it was made under the penalties of perjury;

Third, the defendant did not believe the return to be true and correct as to a material matter; and

Fourth, the defendant acted willfully.

The willfulness requirement is defined as the voluntary and intentional violation of a known legal duty.